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No. 00-285

Supreme Court, U.S.
FILED
OCT 20 2000
CLERK

In the Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

BRIEF AMICUS CURIAE OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Defenders was founded as a non-profit legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty. Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Bennett v. Spear*, 520 U.S. 154 (1997), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), when they were before this Court.

[1] No counsel for either party authored this brief amicus curiae, either in whole or in part. Furthermore, no persons other than amicus curiae contributed financially to the preparation of this brief.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

In 1961 and 1963 respectively, petitioner purchased two building lots in North Myrtle Beach in South Carolina. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628, 629 (S.C. 2000). Both lots are located on man-made, saltwater canals and were created by fill. *Id.* at 630. At the time petitioner purchased his lots, there were no environmental or other zoning restrictions that would have precluded him from building a bulkhead on his lot to protect his property from erosion. Indeed, most of his neighbors constructed houses and bulkheads on their lots during that time period. *Id.*

In 1977, however, the South Carolina Coastal Council promulgated regulations requiring that an owner obtain a permit prior to constructing a bulkhead on the lots and further providing that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. S.C. Code Ann. Regs. 30-12(G)(2)(a) (Supp. 2000).

In 1991, petitioner applied for a permit to construct a bulkhead on his property and for a permit for a 90-foot setback. *McQueen*, 530 S.E.2d at 630. Confusion on the part of the Army Corps of Engineers, which also participated in the permitting process, resulted in no action being taken on one of his permit applications for nearly two years, and petitioner was required to resubmit both permit applications in 1993. *Id.* The Coastal Council then denied the permits pursuant to Regulation 30-12(G)(2)(a). *Id.*

Having exhausted his administrative remedies, petitioner filed a lawsuit in state court seeking just compensation for the taking of his property rights pursuant to the Just Compensation Clause of the Fifth Amendment. *Id.* The trial court found that the property owner had been denied all economically viable use of his property and thus held that the Fifth Amendment had been violated and awarded $100,000 in damages. *Id.* The appellate court agreed holding that the petitioner had suffered a "textbook regulatory taking," but remanded the case on the issue of damages. *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 650 (S.C. App. 1998).

The case was never remanded to the trial court, however, because the South Carolina Supreme Court agreed to review the merits of the liability decision. *McQueen*, 530 S.E.2d at 630. On review, the South Carolina Supreme Court converted the *Lucas* per se test into a three-factor test of which total deprivation of all economically productive and beneficial use of private property is but one factor to be considered by a court in determining liability under the Just Compensation Clause. *Id.* at 630-31. According to the court below, to prevail on a *Lucas*-type takings claim, a property owner must satisfy the following three-part test by establishing that:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
>
> (2) the property owner had distinct investment-backed expectations; and,
>
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within

> the power of the state to regulate under common law nuisance.

Id.

The South Carolina Supreme Court held that petitioner lacked reasonable investment-backed expectations with respect to the use of his property because his property had "been the subject of at least some developmental regulation for over a century. . . . [and] [h]is . . . failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations." *Id.* at 634-35.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE COURT BELOW'S INCLUSION OF "REASONABLE EXPECTATIONS" IN ITS TAKINGS ANALYSIS THREATENS THE PREDICTABILITY PROVIDED BY A DEFINITION OF PROPERTY RIGHTS GROUNDED IN MUTUAL UNDERSTANDINGS OF BACKGROUND PRINCIPLES OF STATE LAW AND THEREFORE WARRANTS REVIEW BY THIS COURT.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court's takings analysis reflected the need for predictability in the law regarding one's rights in property:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. . . . We believe similar treatment must be

> accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Id. at 1027, 1029.

The right to own and enjoy one's property is one of the fundamental rights on which our system of law and government rests and is a potent component of one's property estate. James Madison wrote "as a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, *Property*, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)). These rights, and more particularly property rights, derive from equitable concepts rooted in common law and in the principles of equity that are reflected in the Just Compensation Clause of the Fifth Amendment.

The historical compact recorded in the Just Compensation Clause is in essence an understanding that government's power will be constrained by principles of fairness. *Armstrong v. United States*, 364 U.S 40 (1960). While a government can, under certain circumstances, "take" private property for public use, any such taking is void unless it provides for fair payment in return. U.S. Const. amend. V; *see also Fuller v. United States*, 409 U.S. 488, 490 (1973) (citation omitted) ("The constitutional

requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.").

The requirement of a stable system of property rights for which the government's taking of private property triggers the duty to pay just compensation is reflected throughout takings jurisprudence. For example, in *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the D.C. Circuit Court of Appeals held that "[t]he essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement." *Id.* at 1275 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (holding that property consists of recognized expectancies)).

In *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that physical occupation of private property is a per se violation of the Fifth Amendment:

> [W]hen the "character of the governmental action," is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Id. at 433-35 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that the taking of all beneficial and productive use of private property is tantamount to a

physical taking and thus is also a per se violation of the Just Compensation Clause:

> In the case of land, however, we think that the notion pressed by the council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the *historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture.*

Lucas, 505 U.S. at 1028 (emphasis supplied); *see also Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994) ("The recent Supreme Court decision in Lucas . . . teaches that [i]f a regulation categorically prohibits all economically beneficial use of land – destroying its economic value for private ownership – the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.").

The court below, however, held that regulations adopted long after a building lot was purchased becomes part of the owner's expectations regarding the use of his property and destroys any constitutional right to just compensation if permission to use the property is later denied. *McQueen*, 530 S.E.2d at 633-35. The court below thus holds that a property owner's "understanding" of his rights in his property must change with every new permitting and regulatory requirement, which of course, is nothing less than the opposite of predictability. Indeed, what such a rule of law says, in essence, is that a property owner cannot rely on background principles of the State's law of property and nuisance, but must instead guess and

anticipate every change land use regulators may make with respect to his or her property rights.

That is not to say, however, that there is not an appropriate role for reasonable investment-backed expectations in takings analysis. The proper role of expectations in takings analysis was explained by Justice Brennan in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). The *Penn Central* Court held that where the owner has remaining use of his property, there is no set formula for determining whether the Fifth Amendment has been violated. *Id.* at 123. In such cases, expectations are to be examined along with a number of other factors because the question is whether the particular use denied (less than all use) was one that the owner could have reasonably expected. *Id.* at 124. Taking into account what the law allowed a property owner to do with his property at the time he purchased it also helps determine whether it would be unfair to deny the owner just compensation if later regulations forbid the proposed use. *Id.* There is nothing in the *Penn Central* decision, however, that even hints that government actions can vitiate a vested property right without incurring the constitutional obligation to pay just compensation or that holds that the expectations of a property owner must fluctuate with every regulatory land use change.

To the contrary, the *Penn Central* Court underscored the fact that just compensation would be required if the regulation caused economic harm and "interfere[d] with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* at 125 (citing *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945)

(holding that petitioner did not possess a property right but rather "a privilege or convenience, enjoyed for many years, permissible so long as compatible with navigation interests, but not an interest protected by law . . .); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (holding that riparian owners of the shore and bed of the St. Mary's River had no right of private property in the water power); *Muhlker v. Harlem R. Co.*, 197 U.S. 544 (1905) (reversing decision dismissing complaint for just compensation for taking of recognized property rights)).

The final error the court below makes is in failing to recognize that the rule that just compensation is to be paid for a taking when no use of property is permitted also forms part of the owner's reasonable expectations regarding his property. If that constitutional requirement is part of the landowner's expectations, then no further inquiry into expectations is required and thus the court below erred in holding to the contrary.

II. THE EXISTING SPLIT AMONG LOWER COURTS ON THE ISSUE OF WHETHER A PROPERTY OWNER IS ENTITLED TO RELY ON BACKGROUND PRINCIPLES OF PROPERTY LAW FURTHER INDICATES THAT REVIEW BY THIS COURT IS WARRANTED.

The court below flatly rejected this Court's holding in *Lucas* even though the landowner was denied all beneficial and productive use of his land. *McQueen*, 530 S.E.2d at 629-30. According to the court below, petitioner is not entitled to just compensation because his beachfront property had been the subject of "some" developmental regulation for over a century. *Id.* at 630-35. The court

below concluded that the landowner had thus demonstrated a "distinct lack of investment-backed expectations" to warrant just compensation. *Id.* at 635.

The decision below is within one of the two distinct lines of cases that have developed following the *Lucas* decision. Consistent with *Lucas*, many courts have adopted a categorical rule of liability holding that when the property owner has been deprived of all beneficial and productive use of his property, liability for a taking has been established. The integrity of the *Lucas* per se rule was confirmed last term when this Court upheld a Ninth Circuit decision awarding just compensation for the taking of all economically viable use of the landowners' property. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In *Del Monte Dunes*, the Ninth Circuit explained "compensation is required where regulations 'leave the owner of land without economically beneficial or productive options for its use.' " *Del Monte Dunes*, 95 F.3d 1422, 1432 (9th Cir. 1996); *see also Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) ("In Lucas, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically beneficial use of land, and no balancing of other factors commonly analyzed in takings law – reasonable investment backed expectations and legitimate government interest – would be necessary.").

In *Florida Rock Industries v. United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), the U.S. Court of Appeals for the Federal Circuit suggested that the *Lucas* per se test applies even when there is less than a total taking. In *Florida Rock*, there was a 95 percent

diminution of value. The *Florida Rock* Court stated further that in a takings case, the court must resolve two preliminary questions: "whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking . . . to occur," and "how to determine, in any given case, what that proportion is." *Id.* at 1568; *see also Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1379 (Fed. Cir. 2000), *petition for rehearing or rehearing en banc filed* (May 26, 2000) ("[W]hen . . . the regulatory imposition has deprived the owner of all economically viable use of his property (a 'categorical taking'), then the only remaining issue is the Government's defense under . . . state property law . . . [or] . . . the common law nuisance doctrine.").

In *Chioffi v. City of Winooski*, 676 A.2d 786 (Vt. 1996), the Vermont Supreme Court held that even though the property owner may not have had reasonable investment-backed expectations for use of his building after it had been destroyed by a fire, he could still be entitled to just compensation if he could show that all economically beneficial use of his land had also been destroyed: "[a]ny expectation of a three-unit residential development was no longer 'reasonable,' . . . only the total denial of all economically beneficial use would, under the circumstances, create a taking." *Id.* at 790 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992)).

Likewise, in *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994), the Massachusetts Supreme Court held that "[i]f the judge concludes that the zoning regulation deprives the parcel of all economically beneficial use, the *Lucas* opinion advises us that there is a categorical regulatory taking. . . . " *Id.* at 1316. Finally, in *Ohio ex rel. Pizza v.*

Rezcallah, 702 N.E.2d 81, 93 (Ohio 1998), the Ohio Supreme Court held that the mandatory locking of a storehouse that precluded the owners from making any use of the storehouse for that period of time was a per se violation of the Just Compensation Clause.

In sharp contrast, numerous courts, including the court below, have not followed the *Lucas* rule and have held that even when a regulation deprives a property owner of all use of his property, the property owner must satisfy the reasonable, investment-backed expectations prong of the *Penn Central* test. The leading case for the establishment of the anti-*Lucas* rule, and relied on by the court below, is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000). In *Good*, the U.S. Court of Appeals for the Federal Circuit held that the owner of 40 acres of undeveloped land in Florida was not entitled to just compensation for the taking of all beneficial and productive use of his property by virtue of his being denied a Section 404 permit. The Federal Circuit held that just compensation was not warranted in that case where because of "the growing consciousness of and sensitivity toward environmental issues," the landowner should have foreseen that "the regulatory climate" would bar any future use of his property, even though the landowner had acquired the land prior to enactment of the statute that barred his current proposed use. *Id.* at 1361, 1363; *see also Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996) (rejecting takings claim on the ground that the property owner knew that the regulatory program in place precluded use of the property).

The *Good* rule has been followed by three courts of last resort at the State level and the federal district court

for the District of Columbia. Not only has the Supreme Court of South Carolina followed the *Good* rule in this case, but it also followed it in *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *4 (S.C. June 21, 2000), *petition for cert. filed* (Sept. 20, 2000).

In *Palazzolo v. Rhode Island ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *cert. granted* (Oct. 10, 2000), the landowner sought just compensation for the taking of his land from the Rhode Island Coastal Resources Management Council (CRMC). The Rhode Island Supreme Court held that the landowner was not entitled to just compensation because: "At that time, there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision." *Id.* at 717. In *Colorado Dept. of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), *cert. denied*, 515 U.S. 1159 (1995), the Colorado Supreme Court held that there was no unconstitutional taking of the owners' property because the owners lacked a reasonable expectation that they could use the property in the manner they intended.

In *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied* (Oct. 2, 2000), the landowner sought just compensation for the taking of his land following denial of permits to construct townhouses in the District of Columbia. The United States District Court of the District of Columbia held that the landowner was not entitled to just compensation because "[the landowner] purchased and subdivided its property subject to an existing regulatory scheme that establishes that [the landowner] could have

had no reasonable expectations of development at the time it made its investments." *Id.* at 883.

Finally, in *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *1, 4 (S.C. June 21, 2000), *petition for cert. filed* (Sept. 20, 2000), owners of video gaming machines and video poker businesses in South Carolina sued for a taking when a legislative ban on video gaming machines was upheld by the court below, subjecting the property owners to forfeiture of their property, closure of their businesses and imposition of criminal punishment for engaging in an industry that had always been legal in the State of South Carolina. The court below held that the property owners should have anticipated that the video poker industry, because it was subject to some state regulation, could have been completely prohibited at some point in the future. *Id.* Thus, the court below held, in direct contravention of this Court's ruling in *Lucas*: "Moreover, even where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." *Id.*

CONCLUSION

For all of the foregoing reasons, *amicus curiae* urges this Court to grant the petition for a writ of certiorari. Failing that, in light of this Court's October 10, 2000 decision to grant review in *Palazzolo v. Rhode Island ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *cert. granted* (Oct. 10, 2000), a case which also raises the issue of the role of reasonable investment-backed expectations in a takings

analysis, *amicus curiae* urges this Court to stay its decision until a decision is rendered in that case.

Respectfully submitted,

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October 23, 2000